Dec. 7. Remand - Grier

6

SUPREME COURT OF THE UNITED STATES.

No. ~~302~~ 122, 60, 39, 36
" 35, 34, 15

SAMUEL WILSON, Pl'ff in Error,

vs.

THOMAS WALL and WIFE, et al.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

GIDEON, Printer.

SUPREME COURT OF THE UNITED STATES.

No. 202.

SAMUEL WILSON, Pl'ff in Error,

vs.

THOMAS WALL and WIFE, et al.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

INDEX.

	Original.	Print.
Caption	1	3
Appeal bond	1	3
Register's certificate	2	4
Certificate of appeal	3	4
Citation	3	5
Bill	4	5
Exhibit A	8	8
Defendants' answer	9	9
Exhibit A	17	14
Facts agreed on	18	15
Exhibit A to agreement	20	17
" B "	21	18
Orders of court	25	20
Decree	26	22
Orders of court	31	25
Master's report	32	26
Exceptions to report	34	27
Bond for costs	35	28
Additional report	36	29
Evidence of Patrick B. May	36	29

	Original.	Print.
Exceptions to report	38	31
Decree	39	31
Assignment of errors	40	32
Decree of Supreme Court	41	32
Writ of error	41	33
Bond for costs	43	33
Certificate	43	34
Citation and service	45	34

BE it remembered, that at a regular term of the Supreme Court of the State of Alabama, begun and held on the first Monday in June, A. D. 1859, at the Capitol in the city of Montgomery, there were present and presiding as Judges of said court, Hon. A. J. Walker, Chief Justice; Hon. George W. Stone, Associate Justice; Hon. Richard W. Walker, Associate Justice.

And on Tuesday, July 19, 1859 (being a day of said June term), there was filed in the office of the Clerk of said court, a transcript from the Chancery Court of Sumter County, in the words and figures following, to wit:—

(Appeal Bond.)

The State of Alabama, Sixth Chancery District of the Northern Chancery Division.

Know all men by these presents, that we, Samuel Wilson as principal, and Arnold A. Powell, Patrick B. May and William Meador as securities, are held and firmly bound unto Thomas Wall and Catharine Wall his wife; David Fulsom and Jane his wife; Wm. Muncrief and Margaret his wife; James N. Traham and Sarah his wife, in the sum of three hundred dollars, for the payment whereof well and truly to be made, we and each of us promise and bind ourselves jointly and severally, and our and each of our joint and several heirs, executors or adm'rs firmly by these presents. Sealed with our seals, and dated this 26th day of October, A. D. 1857.

The condition of the above bond is such that at the March term, 1857, of the Court of Chancery for said District, held at Livingston, in a certain cause depending in said court between the said Wall and wife, et al. compl'ts, and the said Wilson, def't, an order was made that the Register advertise and sell the lands claimed by said Wilson, viz: S. E. ¼, and of N. E. ¼ of Sec. 14, town. 18, range 1 east, in Sumter County, and Demopolis land district, according to the rules prescribed for the sale of realty under execution at law; and the said defendant having applied for an appeal to the Supreme Court of the said State, at the term thereof to be held at the capitol in the city of Montgomery, on the first Monday of January next, for the examination of said decree, and the decree (in vacation) of August, 1854; and the said def't having also applied for a transcript of the record and papers on file in said cause: now therefore, if the said def't, or either of said securities for him (in case the said Supreme Court should so decree), shall pay the costs of said cause in said Chancery Court, and of said appeal in said Supreme Court,

and the costs of said transcript also, then said bond to be void, otherwise to remain in full force and virtue.

SAMUEL WILSON, [SEAL.]
By A. A. POWELL.
A. A. POWELL. [SEAL.]
P. B. MAY. [SEAL.]
his
WM. X MEADOR. [SEAL.]
mark.

Signed, sealed, acknowledged and delivered in presence of, and approved by me this 26th October, 1857.

GEO. B. SAUNDERS, Reg.

Filed 26th October, 1857.

Attest: GEO. B. SAUNDERS, Reg.

(Reg's cert.)

The State of Alabama, Sumter County.

I, George B. Saunders, Register of the Court of Chancery for said county, hereby certify that the foregoing is a true copy of the appeal bond in the case in said court, between Thomas Hall and wife, and others, complainants, and Samuel Wilson, defendant, taken from the original on file in said case.

Given under my hand and private seal (there being no seal of office), at Livingston, this, 7th day of November, A .D. 1858.

GEO. B. SAUNDERS, Register. [SEAL.]

(Cert. of Appeal.)

The State of Alabama,
6th Chancery District of the Southern Division.

I, George B. Saunders, Register of the Court of Chancery for said District, do hereby certify that at the spring term, 1854, the Chancellor of the Court of Chancery for the 6th Chancery District of the Southern Chancery Division of the State of Alabama, rendered a decree in a certain cause then depending in said court, wherein Thomas Wall and wife, *et al.*, were compl'ts, and Samuel Wilson, def't. And I further certify that at the spring term, 1857, the same chancellor rendered another decree in the same cause, for the examination of which decrees the said Wilson has, on this day, applied for and taken an appeal to the next term of the Supreme Court of said State, to be held at the Capitol, in the city of Montgomery, on the first Monday of January next.

Witness my hand this 26th day of October, A. D. 1857.

GEO. B. SAUNDERS, Reg.

(Citation.)

The State of Alabama,
6th Chancery District of the Southern Chancery Division.

To Thomas Wall and Catharine Wall his wife, David Fulsom and Jane his wife, William Muncrief and Margaret his wife, James N. Traham and Sarah his wife, or Turner Reavis, Esq., their solicitor:—

Whereas, at the spring term, 1854, the Chancellor of the Court of Chancery for the 6th Chancery District of the Southern Chancery Division of the State of Alabama, rendered a decree in a certain cause then depending in said court, wherein said Wall and wife and others were compl'ts, and Samuel Wilson was defendant: And whereas, at the spring term, 1857, the same chancellor rendered another decree in the same cause, for the examination of which decrees the said Wilson did, on the day of the date of this citation, apply for and take an appeal to the next term of the Supreme Court of said State of Alabama, to be held at the Capitol, in the city of Montgomery, on the first Monday in January next. Now, therefore, you are hereby cited to appear at said term of said Supreme Court to defend against the said appeal if you think proper to do so.

Witness my hand this 26th day of October, A. D. 1857.

GEO. B. SAUNDERS, Reg.

Issued 26th Oct., 1857.

Rec'd and executed on T. Reavis, Esq., Solicitor for the Appellees, 17th day of November, 1857.

D. L. AYRES, Sh'ff Sumter Co.

Original bill pending in the Court of Chancery for the county of Sumter and State of Alabama, to recover real estate and for partition thereof.

THOMAS WALL and CATHARINE his Wife, late Catharine Hall; DAVID FULSOM and JANE his Wife, late Jane Hall; WILLIAM MUNCRIEF and MARGARET his Wife, late Margaret Hall; JAMES N. TRAHAM and SARAH his Wife, late Sarah Hall; and JOSEPH HALL, children of WILLIAM HALL, deceased.

321 vs.

SAMUEL WILSON.

The complainants, on the 28 April, 1849, filed their bill in the words and figures following, to wit:—

(Bill.)

To the Hon. the Chancellor of the Southern Chancery Division of the State of Alabama:

Humbly complaining, showeth unto your honor, your complainants, Thomas Wall and Catharine his wife, who was Catharine Hall;

David Fulsom and Jane his wife, who was Jane Hall; William Muncrief and Margaret his wife, who was Margaret Hall; James N. Traham and Sarah his wife, who was Sarah Hall; and Joseph Hall, that they (except the husbands of your complainants as above set forth) are the only surviving children and heirs at law of William Hall, now deceased, and that they are now all of full age. Your complainants further show that the said William Hall left two other children, to wit, Silas and Eliza Ann, both of whom have long since departed this life unmarried and without issue.

They further show unto your honor, that by the fourteenth article of a treaty, entered into on the 27th of September, 1830, by John H. Eaton and John Coffee, for and in behalf of the Government of the United States, and the Mingoes, chiefs, captains, and warriors of the Choctaw Nation, began and held at Dancing Rabbit Creek; it is provided that "each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so by signifying his intention to the agent within six months from the ratification of the treaty, and he or she shall thereupon be entitled to a reservation of one section of six hundred and forty acres of land, to be bounded by sectional lines of survey; in like manner shall be entitled to one-half that quantity for each unmarried child which is living with him over ten years of age, and a quarter section for each child as may be under ten years of age, to adjoin the location of the parent. If they reside upon said lands, intending to become citizens of the States for five years after the ratification of this treaty, in that case a grant in fee simple shall issue; said reservation shall include the present improvement of the head of the family, or a portion of it. Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove, are not to be entitled to any portion of the Choctaw annuity."

Your complainants further show that at the time of the making and ratification of the said treaty, their said father, William Hall, was a Choctaw head of a family, and your complainants (except their husbands as above set forth) were then all unmarried, and were living with their said father; they further show that said Catharine and said Jane, complainants as aforesaid, were over ten years of age, and that said Silas (mentioned in the foregoing part of this bill as being dead) was also at that time living with his father, and over the age of ten years; that the said Margaret, said Sarah, and said Joseph (above set forth as complainants), were under ten years of age; and the said Eliza Ann, now deceased, was likewise living with her father, and was under ten years of age.

Your complainants further show, that pursuant to said fourteenth article, the following lands were reserved for said William Hall and his children, to wit: section twenty-four, containing $638\frac{84}{100}$ of acre; section twenty-three, containing $640\frac{72}{100}$ of an acre; sec-

tion thirteen, containing 640 acres; and the east ½ of section fourteen, containing $320\frac{82}{100}$ acres; all in township eighteen, of range one east; in the Demopolis Land District, Alabama; which said lands were by patent from the United States, under the said article of the treaty, conveyed on the 29th day of June, 1841, to said William Hall, a certified copy of which said patent is herewith filed marked Exhibit A, and is prayed to be taken as a part of this bill of complaint.

Your complainants further show that said William Hall (their father, to wit, the father of your female complainants and of the said Joseph Hall) died long since intestate; that so much of said reservation as was his by said treaty, has descended to and is in your complainants, his children, as his sole heirs at law; that the remainder of said lands belong to your complainants by virtue of said treaty.

They further show that no division of said lands has ever taken place between your complainants, nor has there ever been any adjustment of the rents and profits thereof.

They further show unto your honor, that William Bates, of the county of Sumter, John W. Smith, of the county of Sumter, Patrick B. May, of the county of Sumter, Samuel Williamson, of the county of Sumter, William Meador, Jr., of the county of Sumtor, and E. Houpt, of the county of Green, are in possession of said lands; all of which said lands lie in the county of Sumter, and State of Alabama: that the said parties have been in possession of lands, and in receipt of the rents and profits thereof for a long time, to wit, from the first day of January, 1840, and that the rents and profits thereof have been worth a large sum of money, to wit, the sum of fifteen thousand dollars.

Your complainants further show that they are not advised, and cannot set forth what particular tracts or parcels of said lands, each of the said parties are in possession of, or whether they have been jointly possessed of the whole, and of this they pray a discovery; nor can they set forth what are the rents and profits that each should account for, or whether each should be held liable for the whole, and of this they pray a discovery.

Your complainants further show to your honor that said persons pretend to claim said lands by purchase from said William Hall, the father of your complainant, Joseph Hall, and of your female complainants, as aforesaid. Whereas, your complainants charge the fact to be, that the said pretence is, as they are, false, and further charge that said William could not sell and convey so much of said lands as by said treaty were reserved for your complainants under the designation of unmarried children, over ten and under ten years, as aforesaid.

In tender consideration whereof, and inasmuch as your complainants are wholly remediless in the premises by the strict rules of the common law, and can only have relief in the premises in a

court of equity, where matters of this sort are properly cognizable and relievable; to the end, therefore, that said William Bates, John W. Smith, Patrick B. May, Samuel Williamson, William Meador, Jr., and E. Houpt, may, upon their several and respective corporal oaths, full, true, direct, and perfect answers make to all and singular the matters and things aforesaid, and that as fully and particularly as if they and each of them were specially interrogated thereto, and that your complainants may have a partition of lands among them, and may be placed in possession of the same; and that said defendants may account with and be decreed to pay over to your complainants the rents and profits of said land since they have had the same, and that your complainants may have such other and further relief as to your honor may seem right in the premises, and the nature of the case may require, may it please your honor to grant unto your complainants the State's most gracious writ of subpœna, to be directed to said William Bates, John W. Smith, Patrick B. May, Samuel Williamson, William Meador, Jr., and E. Houpt, commanding them to be and appear, within the time prescribed by law, before your honorable court, to be held in the county of Sumter, for the third district of the Southern Chancery Division of the State of Alabama, on the first Monday in June next, and full, true, direct, and perfect answers make to all and singular the matters aforesaid; and further to stand to, perform and abide by such further order and decree as to your honor may seem meet in the premises, and the nature of the case may require; and your complainants, as in duty bound, will ever pray, &c.

INGE & HILL, and
R. H. & J. L. SMITH,
Sols. for Compl'ts.

Filed April 28, 1849.
Attest, GEO. B. SAUNDERS, Reg.

(Exhibit A.)

The United States of America

To all to whom these presents shall come, greeting:—

Whereas, under the fourteenth article of the treaty entered into at Dancing Rabbitt Creek, on the twenty-seventh day of September, in the year of our Lord one thousand eight hundred and thirty, by John H. Eaton and John Coffee, Commissioners on the part of the United States, and the Chiefs, Captains, and head men of the Choctaw Nation, on the part of said nation, William Hall became entitled, out of the lands ceded to the United States, by the said treaty, to three sections and a half section of land; and, whereas, section twenty-four, containing six hundred and thirty-eight acres and eighty-four hundredths of an acre; section twenty-three, containing six hundred and forty acres and seventy-two hundredths of an acre; section thirteen, containing six hundred and forty acres, and the

east half of section fourteen, containing three hundred and twenty acres and eighty-two hundredths of an acre, all in township eighteen of range one east in the Demopolis Land District, Alabama, according to the official plat of the survey of the said lands returned to the General Land Office by the Surveyor-General, have been located in favor of said William Hall as his reserve, and the location thereof having been approved on the thirteenth day of October, 1838, by the President of the United States: Now know ye, that the United States of America, in consideration of the premises, and in conformity with the provisions of the said treaty, have given and granted, and by these presents do give and grant unto the said William Hall and to his heirs, the said tracts above described, to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said William Hall, and to his or their heirs and assigns forever.

In testimony whereof I, John Tyler, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be thereunto affixed.

Given under my hand, at the City of Washington, the twenty-ninth day of June, in the year of our Lord one thousand eight hundred and forty-one, and of the independence of the United States the sixty-fifth.

By the President, JOHN TYLER,
By R. TYLER, Sec'y.

I. WILLIAMSON,
Recorder of the General Land Office.

Filed Ap. 28, 1849.
Attest: GEO. B. SAUNDERS, Reg.

(Wilson's Answer.)

And on the 30th May, 1849, the defendant Wilson filed his answer thereto in the words and figures following, to wit:—

THOMAS WALL & WIFE, & others
vs.
SAMUEL WILSON.

Pending in the Third District of the Southern Chancery Division of the State of Alabama, in the county of Sumter in said State.

The separate answer of Samuel Wilson, who has been sued as Samuel Williamson, to the bill of complaint filed by the complainants in the above entitled cause.

This respondent now and at all times hereafter reserving and saving to himself all manner of exception to the manifold uncertainties, untruths, and imperfections in the complainants' bill contained, for answer thereto, or unto so much thereof as he is advised it is material for him to make answer to, says:—

He has no knowledge of or acquaintance with Thomas Wall or Catharine his alleged wife, nor does he know David Fulsom or Jane his alleged wife—has seen William Muncrief, but knows not Margaret his alleged wife, nor James A. Traham or Sarah his alleged wife; nor does he know anything of Joseph Hall, nor did he know Silas and Eliza Ann Hall, charged to have departed this life; nor does this respondent know whether or not the said Catharine, Jane, Margaret, Sarah, Joseph, Silas, and Eliza Ann, were the children or reputed children of the said William Hall; nor does he know anything of the marriage of Catharine, Jane, Margaret, and Sarah, as alleged in complainant's bill. As to all these matters respondent prays that complainants may be held to strict legal proof.

This respondent admits that on the 27th day of September, 1830, a treaty was concluded, at a place called Dancing Rabbitt Creek, between the United States of America, represented by John H. Eaton and John Coffee, as commissioners, and the chiefs, captains, and head men of the Choctaw nation, which said treaty was ratified by the President and Senate of the United States on the 24th day of February, 1831, and that the 14th article of said treaty is in the words following, to wit: "Article XIV. Each Choctaw head of a family being desirous to remain and become a citizen of the States shall be permitted to do so by signifying his intention to the agent within six months from the ratification of this treaty; and he or she shall thereupon be entitled to a reservation of one section of six hundred and forty acres of land to be bounded by sectional lines of survey; in like manner shall be entitled to one-half that quantity for each unmarried child, which is living with him, over ten years of age; and a quarter section to such child as may be under ten years of age, to adjoin the location of the parent. If they reside upon said lands, intending to become citizens of the States, for five years after the ratification of this treaty, in that case a grant in fee simple shall issue; said reservation shall include the present improvement of the head of the family, or a portion of it: persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove are not to be entitled to any portion of the Choctaw annuity."

This respondent has understood and believes, and therefore admits, that William Hall was, at the time of the making and ratification of the treaty aforesaid, the Choctaw head of a family, and resided near the Tombecbe River, in what is now Sumter County, and had a woman living with him regarded, under the custom of the Choctaws, as his wife; and also several children, at the time unmarried, but the number, sexes, or ages of his children, or their names, are, and were at the time, unkown to this respondent, and he has now no means of knowing whether the present complainants are the same children who were living with William Hall at the date and ratification of the treaty aforesaid, or what were their

respective ages at that time; and as to these matters, he also prays that complainants may be held to strict legal proof.

This respondent further answering says, that before he purchased any land of said William Hall (as hereinafter set forth) he was informed that said William Hall claimed a reservation of land under the provisions of the treaty aforesaid. This respondent was not familiar with the terms and provisions of the treaty, and cannot therefore state that he knew at that time under which particular article or clause of the treaty the claim of Hall was founded, but he is now satisfied and admits that the claim of Hall to a reservation of land was founded upon the 14th article of the treaty before referred to, and that the several tracts of land described in complainants' bill were in fact by authority of the government of the United States located to the said Hall on account of his reservation secured by said 14th article, and reserved from sale. This respondent denies that said lands were reserved for William Hall *and his children*, but on the contrary thereof they were reserved for the said William Hall, and subsequently granted and conveyed to him by the United States of America by patent duly signed and delivered by the President of the United States, dated 29 June, 1841, the original of which is now in possession of Patrick B. May, one of the defendants in this cause, and will be produced as evidence upon the final hearing thereof. By this patent it will be seen that the title to the lands in question was granted and conveyed to William Hall in his individual character, and for his sole and individual benefit, and not for himself *and his children*. This respondent has heard that William Hall is dead, but when he died this respondent does not know. This respondent has no knowledge that complainants are the heirs at law of William Hall, or that they are his children. He has understood that Hall had a wife, or that a woman lived with him, who, under the custom of the Choctaw tribe of Indians, was regarded as his wife during the time she lived with him; but how many wives he had, or whether more than one, or which one, was the mother of complainants, respondent has no knowledge or means of ascertaining. This respondent has been advised, and therefore charges that, according to the custom of the Choctaws, bigamy was no offence, but the husband or head of the family had a right to have any number of wives at the same time, so that it would be difficult to decide what children of the Choctaw head of a family could be regarded as heirs at law of the father.

This respondent admits that, so far as he knows or believes, there has never been a partition of the lands in question between or among the complainants, nor have they, so far as respondent is informed, ever had an adjustment of the rents and profits, but on the contrary thereof this respondent never supposed or believed that the complainants ever had any interest in, or title to the lands in question, or to the rents and profits arising therefrom.

This respondent further says, that on the 13th of December, 1834,

being desirous to purchase lands for permanent settlement, he entered into a contract with said William Hall, for the purchase from him of the southeast quarter of, and south half of the northeast quarter of section fourteen, township eighteen, range one east, a copy of which contract is hereto annexed, marked Exhibit A, the original of which will be produced and proved at the final hearing of this cause, by which respondent agreed to pay to said Hall the sum of seven hundred and fifty dollars for said last mentioned lands, and in pursuance of said contract, respondent, on the 29 February, 1836, completed the payment to Hall of the whole of said purchase-money; before the date of this contract with Hall, one William McNese had settled upon said lands, supposing them to be public lands, and had cleared and fenced about three or four acres. This respondent purchased also this improvement from said McNese, for which he paid the sum of one hundred dollars. Upon the payment of the purchase-money as above mentioned, the said William Hall, on the 29 February, 1836, made to this respondent a deed of conveyance of said lands above purchased, *to this respondent*, in which deed his then reputed wife, Susan Hall, joined, which deed was duly acknowledged and recorded in the office of the clerk of the County Court of said county of Sumter, and will be produced in evidence upon the final hearing of this cause. At the time of this purchase from said Hall, respondent never had heard from any source that any child or children of said Hall, had or pretended to have any title or claim whatever to said lands, and this respondent in good faith made the purchase, and gave a full and fair price for the lands, and paid the entire purchase-money without any notice or intimation of title or claim of title in the children of said Hall. This respondent took possession of said lands, and for a long time afterwards, never knew or heard that the complainants, or the children of Hall, had or pretended to have any claim whatever to the lands in controversy. In fact, this respondent never heard of any claim or pretence of claim, until very recently he heard the present suit had or was about to be commenced.

This respondent is advised and believes, that at the time of the making of the treaty, and for more than five years after its ratification, it was understood and believed by both parties to it, by the Choctaws themselves, and by the department of the government having the superintendence of its execution, that the 14th article providing reservations of lands to the Choctaw heads of families on account of their improvements, and as a sort of bounty for the number of children each reservee had living with him at the date of the treaty aforesaid; as evidence that such was the construction of the treaty by both the parties to it, the government of the United States in causing a list of the names of the reservees who claimed the benefit of the 14th article to be made and returned to the war department with the number and ages of the children of such, in no instance required the *names* of the children to be re-

turned, but in all cases issued the grant in fee simple for all the lands reserved, to the head of the family, without reference to any right or supposed right in the children, and this was done with the uniform acquiescence of the reservees. The patent issued to Hall conformed to this practice. After the purchase of the land from Hall by this respondent, in 1836, Hall removed with his family to the Choctaw nation, west of the Mississippi River, and again became identified with the tribe of Indians to which he belonged, and if the complainants composed a part of his family as alleged by them, they doubtless aided in the expenditure of the purchase-money paid Hall by respondent. This respondent, so far from supposing that he purchased lands to which the vendor had no title, supposed that by making the purchase fairly as he did, he was affording his aid in carrying out the policy and wishes of the government in causing the emigration of the Indians to the county allotted to them. So anxious was the government to effect the early removal of the Indians to the west, that the then President of the United States authorized assurances to be publicly given that the Choctaws entitled to reservations of lands could sell their lands even prior to their location, and stated that such sales would be subsequently proved, provided they were fair, and as much as $1 25 per acre was paid for the land.

This respondent settled upon and commenced improving the lands purchased by him, upon the purchase thereof, and holding as he supposed title thereto under the authority of the United States, has gradually and from year to year since he has had the same, made thereon in good faith, improvements of the following description and value; which said improvements he considered necessary to his convenience and comfort, and to the business of planting in which he was engaged, to wit:—

Clearing and preparing for cultivation 200 acres of land, worth $10 per acre,	$2,000 00
Building good gin-house and cotton-press, worth	600 00
Building dwelling-house, kitchen, smoke-house, negro house, stables, corn-crib, &c., worth about	500 00
Making garden, planting and rearing fruit-trees, &c., worth about	100 00
	$3,200 00

These improvements are permanent and valuable, and there were no other improvements on the lands when this respondent purchased them of said Hall, except the small improvement by McNese, for which respondent paid.

This respondent therefore avers and insists: 1st. That he was a bona fide purchaser of the land in controversy for a full and fair price without notice of the claim or pretended claim of complainants, and purchased from William Hall, who at the time had a conditional

grant from the United States, which was afterwards confirmed and a grant in fee simple issued to him. 2d. That the 14th Article of the Treaty of Dancing Rabbitt Creek secured and granted the lands in question to William Hall as the Choctaw head of a family. 3d. That the treaty did not identify or locate any lands to which the children of a reservee were entitled, and none having been identified or located for them, they could only complain to the government of an infraction of the treaty if entitled to lands. 4th. That a grant in fee simple having issued to William Hall for the lands in question, without fraud, the title under this grant enured to respondent his vendor. 5th. That complainants would have no right to recover without averring and proving a fulfilment of all the conditions upon which the alleged grant to them depended.

This respondent also insists upon the facts stated, that he is entitled to the lands in controversy; but if this court should decide otherwise respondent respectfully prays that proper legal steps be taken to ascertain the nature, extent, and value of the improvements made by him upon the lands in controversy, and that by a decree of this court the said complainants be required and compelled to pay to him the full and fair value of all such improvements before they are allowed the benefit of any judgment, decree, or writ of partition or possession in the premises.

Having now answered all the material allegations in complainants' bill, respondent prays to be hence dismissed with his reasonable costs, &c. LYON & PRERILL, for Resp'd't.

The State of Alabama, Sumter County.

Before me, Hugh Blakeney, the undersigned, an acting justice of the peace in and for said county, personally came Samuel Wilson, the respondent in this case, who being duly sworn says that the facts and allegations stated and charged in the foregoing answer are true to the best of his knowledge and belief.

his
SAMUEL + WILSON.
mark.

Sworn to and subscribed before me this 29th day of May, 1849.
HUGH BLAKENEY, J. P.

(Exhibit A.)

State of Alabama, Sumter County.

Articles of agreement made between William Hall of the one part and Samuel Wilson of the other, witnesseth, that the said Wm. Hall doth agree to let the said Wilson have two hundred and forty acres of land, being the northeast and southeast quarters of section fourteen, in township eighteen, range one east. The said Hall binds himself to make to said Wilson a title for the above land as soon as he get titles from the United States for the same; and the

said Hall further binds himself and heirs, and assigns to fulfil or make good titles as above stated in case of death or any unforeseen accident; and the said Samuel Wilson binds himself to pay to William Hall the sum of seven hundred and fifty dollars, four hundred dollars paid down, three hundred and fifty dollars to be paid when the said Hall makes titles to the said Wilson, which two numbers, when paid, will be the full amount for the aforesaid land; and the said Wilson binds himself and heirs to comply with the above contract the 13th Dec., 1834.

Witness our hands and seals.

Signed, WILLIAM HALL, [SEAL.]
SAMUEL WILSON. [SEAL.]

Witness—
JAMES R. LANDRUM,
NOBLE JOHNSON,
JOSEPH LANDRUM.

Filed May 30th, 1849.
Attest: GEO. B. SAUNDERS, Reg.

(Bill and Exhibit when filed.)

(Facts agreed on.)

For the purpose of securing an early trial and decision of the cause upon its merits, it is agreed that the defendants be allowed to sever, and that this cause be prosecuted against Wilson alone, and such decree rendered in his case as would have been rendered against him if he had continued a joint defendant with the other parties named.

It is admitted and agreed that the southeast quarter and the south half of the northeast quarter of section fourteen, in township eighteen of range one east, referred to in complainant's bill, and sought to be recovered of Wilson, form a part of the lands occupied by the Choctaw tribe of Indians at the date of the treaty of Dancing Rabbit Creek of September, 1830, between the United States and the Choctaw tribe of Indians, and that the lands in question constitute a part of the tract reserved to or in the name of William Hall, under the 14th article of said treaty, and embraced in the patent issued by the government of the United States to William Hall, dated the 29th of June, 1841, a copy of which is hereto annexed, marked A, and made a part of this case agreed.

It is further admitted that William Hall, since the issuing of said patent, has died, and that the complainants Catharine, Jane, Margaret, Sarah and Joseph, are the children of the said William Hall, who resided with him at the date of said treaty; that said William had two other children living with him at the date of said treaty named Silas and Eliza Ann, who have died without issue since the making of said treaty, and before the institution of this suit.

It is further agreed that the said William Hall claimed the lands

described in the said patent as the Choctaw head of a family, under and by virtue of the provisions of the 14th article of said treaty, and that in asserting his claim to the reservation granted he reported himself to the agent of the government of the U. S. as the Choctaw head of a family, living on said lands at the date of the treaty, and having an improvement thereon, with children living with him at the time over ten years of age and under ten years of age, and that the names of the children were neither taken down nor reported to the gov't by its agent. It is further admitted that upon William Hall's fulfilling the five years' residence upon the land after the ratification of the treaty, the grant in fee, a copy of which is annexed, was issued to him.

It is further agreed that Wilson in good faith on the 13 Dec. 1834, made the contract with William Hall for the purchase of the lands in question, a copy of which is annexed to his answer; that he paid to Hall the purchase-money, amounting to seven hundred and fifty dollars, and on the 29th February, 1836, received from Hall a deed of conveyance of the land, with clause of warranty of title, went into possession thereof, has been in possession since, and made thereon valuable improvements, the extent of their value to be ascertained thereafter.

There is no evidence that Wilson had notice of any outstanding title or claim to the land of the children of Hall, unless he be charged with it from his answer in the cause, and the foregoing facts agreed on.

It is further agreed, that the business of carrying into effect the provisions of the treaty on the part of the United States appertained to the war department; that in ascertaining to whom the patents should issue to the lands under the 14th article, it was not usual or customary to take down or return to the war department the names of children of heads of families, but in executing this article of the treaty, the agent returned the names of heads of families, with the No. and ages of their children, and in issuing the grants in fee simple under this article of the treaty it was usual and customary to issue them in the same form with the patent to Hall, until the passage of the act of 1842, which changed the practice in issuing patents, as explained in the opinion of Attorney-general Legare, a copy of which is hereto annexed, and marked exhibit B.

It is further admitted for the purpose of showing the practice of the government prior to the act of 1842, in issuing patents, that Alex'r Brashears, Betsey Buckholts, John Walker, Betsey Pinson, and others, received patents for their respective reservations under the 14th article of the treaty, in the same form with that issued to Hall.

Under these facts agreed, each party reserves the right to insist upon any question, either in this court or in any appellate, which the facts may present.

It is admitted that the land embraced in this agreed case formed

a part of said William Hall's reservation, under said 14th article of said treaty, but was no part of the section on which he lived at the date of said treaty.

R. H. & J. L. SMITH,
Sols. for Compl'ts.

LYON & PRINCE,
Sols. for Def'ts.

Filed Feb'y 27, 1852.

Attest: GEO. B. SAUNDERS, Reg.

(Exhibit A, to Agr't.)

The United States of America

To all to whom these presents shall come, greeting:

Whereas, under the fourteenth article of the treaty entered into at Dancing Rabbit Creek, on the twenty-seventh day of September, in the year of our Lord one thousand eight hundred and thirty, by John H. Eaton and John Coffee, Commissioners on the part of the United States, and the chiefs, captains, and head men of the Choctaw Nation, on the part of said Nation, William Hall became entitled, out of the lands ceded to the United States by the said treaty, to three sections and a half section of land; and whereas section , containing six hundred and thirty-eight acres and eighty-four hundredths of an acre; section twenty-three, containing six hundred and forty acres and seventy-two hundredths of an acre; section thirteen, containing six hundred and forty acres; and the east half of section fourteen, containing three hundred and twenty acres and eighty-two hundredths of an acre, all in township eighteen, of range one east, in the Demopolis land district, Alabama, according to the official plat of the survey of the said lands returned to the General Land Office by the Surveyor-general, have been located in favor of said William Hall as his reserve, and the location thereof having been approved on the thirteenth day of October, 1838, by the President of the United States; now know ye, that the United States of America, in consideration of the premises, and in conformity with the provisions of said treaty, have given and granted, and by these presents do give and grant unto the said William Hall, and to his heirs, the said tracts above described, to have and to hold the same, together with all the rights, privileges, immunities and appurtenances, of whatsoever nature thereunto belonging, unto the said William Hall, and to his heirs and assigns forever.

In testimony whereof I, John Tyler, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the twenty-ninth day of June, in the year of our Lord one thousand eight

hundred and forty-one, and of the independence of the United States the sixty-fifth.

[L. S.] By the President, JOHN TYLER,
By R. TYLER, Sec'y.

I. WILLIAMSON,
Recorder of the General Land Office.

Recorded vol. 1, page 30.

Filed with Agreement 27 Feb'y, 1852.
Attest: GEO. B. SAUNDERS, Reg.

(Exhibit B, to Agreement.)

(Copy.)

Office of the Attorney General,
2d November, 1842.

Sir: During your absence I received from the office of Indian affairs a letter requesting my official opinion upon the following statement: —

By the 14th article of the treaty of Dancing Rabbit Creek with the Choctaws, made in September, 1830, each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so by signifying his intention to the agent within six months from the ratification of this treaty, and he or she shall therefore be entitled to a reservation of one section of six hundred and forty acres of land, to be bounded by sectional lines of survey; in like manner shall be entitled to one-half that quantity for each unmarried child which is living with him over ten years of age, and a quarter section to such child as may be under ten years of age, to adjoin the location of the parent." These words were construed by Mr. Secretary Cass to give to the parent the title to the halves and quarters of a section stipulated for in right of the children. This construction has been the uniform one of the department in executing the treaty, and patents have issued accordingly, of the correctness of which no doubt has been entertained heretofore. The register of those that applied to the agent under the article contained the names of the heads of families only, which would seem to show that the children were not entitled, in the opinion of the Indians themselves, who furnished the materials for the register.

That report set forth A. B. (the head of the family), 3 children over ten years of age, 2 under ten years, &c.

The commissioner then proceeds to call my attention to the 3d section of the act of 23d August, 1842, which contains a provision inconsistent with the interpretation hitherto adopted and acted on by that department.

Opinion.

The legislature has under our government no constitutional power to settle the rights arising under treaties except in cases purely *political.* But in every question which involves a controversy about *meum* and *tuum*, the treaty (unless merely executory and calling for future legislation) is itself the supreme law, and must be construed by the judicial department when a case shall arise between individuals.

Therefore this act of 1842, if it be inconsistent, and so far as it may be inconsistent with the 14th article of the treaty of 1830, will, whenever a case shall be made for the courts, be declared by them to be null and void. If the right construction of that article be, that the children are to take only by inheritance and not by purchase, that is as privies of their parents and not in their own right, the patent ordered by that act to be issued to the children, will be decreed by courts of equity to be held *in trust* for the right heirs or representatives of the father, and to be assigned accordingly. This, however, the legislature have a right to do. It can prescribe to the executive how a mere administrative act shall be performed. It may in its discretion ordain that a patent conveying land to A, B, and C, or to A and his children, shall be made out in the name of A alone.

What rights as between individuals shall vest under such a conveyance, it has, as I have said, no power to determine, in a case where mere *rights* have been the subject of the treaty. But remedy, and mode, and formula, especially in a matter of administration, are, I conceive, within the province, and its will, in these respects, is binding on the executive, from and after the declaration of it. Accordingly, had the act of 1842 been nearly contemporaneous with the treaty, I should have had no difficulty in advising the strictest compliance on the part of the executive, with its precepts. The patents must in that case have been made out to the children originally; and in all cases *hereafter* to be disposed of, I am still of opinion that they must issue in this form, the rights of the parties under them being left for the court to decide.

The difficulty is how to reconcile this plainly legislative construction, with that hitherto (as I am assured by the head of the Indian department) adopted by the executive.

And it is impossible to reconcile them. With my views of this subject, it is not necessary that I should say which is in my judgment the better construction, that of the executive, or that of the legislative department; I would barely observe that the words are so extremely doubtful as to be susceptible of either.

Had the act of 23d August, therefore, never been passed, and you had propounded the same question to me, I should certainly have advised you to adhere to Mr. Secretary Cass' interpretation. Besides the consideration due to his peculiar experience in Indian

affairs, it would have been enough for me that he had established a rule in a doubtful matter, and that many titles had been conveyed on the strength of it. It is in such cases especially that the maxim of the law applies, *minime mutanda sunt qua certain interpretationem semel habuere.*

If the question now is, Shall all that has been done on the strength of that construction be undone? in conformity with the legislative rule of the 23d August last, I answer that it cannot be undone by the executive department. That department is *functus officio* in the premises. The patents it has hitherto issued must stand; they will pass for what they are worth, and the judicial tribunals only are competent to say what that is.

To give to a legislative act retrospective operation would be to violate the constitution.

But for the future: I am of opinion that patents ought to issue conformably to the act of 23d August, care being taken, however, to show on the face of them that they are issued to children independent of their father, in conformity with that act, and to fulfil the 14th article of the treaty. This ought to be done to the end that no future assignee may be able to protect himself against a judicial construction, confirmatory of that of Mr. Secretary Cass (should such an one be made), by the plea of bona fide purchaser for valuable consideration. Such deed would be a fulfilment of the will of the legislature in the mere formal conveyance of the title of the government in the lands in question, without prejudicing the rights of individuals under it, which the legislature has no constitutional authority, and therefore it must be presumed no intention to do.

I have the honor to be, sir, your ob't servant,
(Signed) H. S. LEGARÉ.

Hon. John C. Spencer, Sec'y of War.

Filed with Agreement 27 Feb'y, 1852.
Attest: GEO. B. SAUNDERS, Reg.

(Order at Feb'y Term, 1852.)

And a term of the Court of Chancery for the Third Chancery District of the Southern Chancery Division of the State of Alabama, begun and held at the court-house in the town of Livingston, on the fourth Monday (being the 23d day) of February, in the year of our Lord one thousand eight hundred and fifty-two:

Present, the Honorable Joseph W. Lesesne, Chancellor of said court: And on Friday, 27th February, 1852 (being a day of said term), the following order was passed in said cause, to wit:—

THOMAS WALL and WIFE, *et als.*,
vs.
WM. BATES *et als.*
} 321.

By consent of parties this cause is submitted for a decree upon the written statement of facts on file, and the decree is to be rendered and entered in vacation as of the present term.

(Cont'd at June T., 1852.)

And at a term of the Court of Chancery for the Third Chancery District of the Southern Chancery Division of the State of Alabama, begun and held at the court-house in the town of Livingston, on the first Monday (being the 7th day) of June, in the year of our Lord one thousand eight hundred and fifty-two: And on Wednesday, June 9th, 1852 (being a day of said term), and the Hon. Joseph W. Lesesne, Chancellor of said court, not being present, the following entry was made in said cause, to wit:—

(Order at Feb. T., 1853.)

THOMAS WALL and WIFE, *et al.*,
vs.
WM. BATES *et al.*
} 321. Continued.

And at a term of the Court of Chancery for the Third Chancery District of the Southern Chancery Division of the State of Alabama, begun and held at the court-house in the town of Livingston, on the fourth Monday (being the 28th day) of February, in the year of our Lord one thousand eight hundred and fifty-three: Present, the Honorable Joseph W. Lesesne, Chancellor of said court: And on Saturday, March 5th, 1853 (being a day of said term), the following order was passed in said cause, to wit:—

THOMAS WALL and WIFE, *et al.*,
vs.
WM. BATES *et al.*
} 321.

By consent of parties this cause is submitted for a decree on the written statement of facts on file, and the decree is to be rendered and entered in vacation as of the present term.

(Cont'd at June T., 1853.)

And at a term of the Court of Chancery for the Third Chancery District of the Southern Chancery Division of the State of Alabama, begun and held at the court-house in the town of Livingston, on the first Monday (being the sixth day) of June, in the year of our Lord one thousand eight hundred and fifty-three: Present, the Honorable Joseph W. Lesesne, Chancellor of said court: And on Tuesday, June 7th, 1853 (being a day of said term), the following order was passed in said cause, to wit:—

(Order at April T., 1854.)

THOMAS WALL and WIFE, *et al.*,
vs.
WM. BATES *et al.*
} 321. Continued under former orders.

And at a term of the Court of Chancery for the Third Chancery District of the Southern Chancery Division of the State of Alabama, begun and held at the court-house in the town of Livingston, on the first Monday after the fourth Monday (being the 3d day of April) of March, in the year of our Lord 1854: Present, the Honorable Wade Keyes, Chancellor: And on Wednesday, April 5th, 1854 (being a day of said term), the following order was passed in said cause, to wit:—

THOMAS WALL and WIFE, *et al.*,
vs.
WM. BATES *et al.*
} 321.

This cause coming on to be heard, was argued by counsel, and the court considering it difficult, takes the same under advisement, and by consent the decree is to be rendered and entered in vacation as of the present term.

(Decree in Vacation.)

In Chancery. At Livingston, Spring Term, 1854.

WALL and WIFE, *et al.*,
vs.
SAMUEL WILSON *et al.*
} 321.

It appears in this case that one William Hall was the Choctaw head of a family, and that at the date of the treaty made at Dancing Rabbit Creek he had three children over ten years of age and unmarried, viz., Catharine, Jane, and Silas; and that he also had at that time living with him four children who were under ten years of age, viz., Margaret, Sarah, Joseph, and Eliza Ann.

It appears that he became entitled to and received a patent for three and a half sections of land by virtue of the fourteenth article of the said treaty, and that afterwards he aliened, for a valuable consideration, and by deed with warranty, the whole of the land.

It further appears that before the filing of this bill, he died, and also that Silas and Eliza Ann died, unmarried, and without issue.

It is agreed between the parties "that the southeast quarter and the south half of the northeast quarter of section fourteen, in township eighteen of range one east, referred to in complainants' bill and sought to be recovered by the defendant Wilson," are parts of the said three and a half sections, and that they were not parts of the section upon which the said Hall lived at the date of said treaty. And further, it is agreed "that the defendants be allowed to sever, and that this cause be prosecuted against Wilson alone, and that

such decree rendered in his case as would have been rendered against him, if he had continued a joint defendant with the other parties named."

The complainants claim by virtue of the treaty, and pray a partition of the lands and an account of the rents, and for general relief.

The 14th article of the treaty, the one under which the claim in this cause is asserted, is in these words: "Each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so, by signifying his intention to the agent, within six months from the ratification of this treaty; and he or she shall thereupon be entitled to a reservation of one section of six hundred and forty acres of land, to be bounded by sectional lines of survey; in like manner shall be entitled to one-half that quantity for each unmarried child which is living with him, over ten years of age, and a quarter section to such child as may be under ten years of age, to adjoin the location of the parent. If they reside upon said lands, intending to become citizens of the States for five years after the ratification of this treaty; in that case a grant in fee simple shall issue; said reservation shall include the present improvement of the head of the family, or a portion of it. Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove, are not to be entitled to any portion of the Choctaw annuity."

On reading this awkwardly drawn article, we observe—

1. That it extends to no class of Indians except *heads of families*. 2. That there can be no claim for a child that is not living with the parent. 3. That the benefit of the article is inchoately obtained by the head of a family "signifying his intention to the agent within six months from the ratification of this treaty that he intends to remain and become a citizen of the States." 4. That the benefit is consummated by the issuance of "a grant in fee simple," if "they reside upon said lands intending to become citizens of the States for five years after the ratification of this treaty." The question arises, to whom does "they" refer? It may be argued that it refers to heads of families alone, since the other construction includes children of one, two, and three years, and it is impossible that children of such years should reside upon the lands with an intention to become citizens. The first construction, too, seems strengthened by the requisition of residence "on said lands." 5. That it may be true that the saving of Choctaw citizenship and the denial of annuity to persons who claim under the 14th article of the treaty are confined to heads of families alone. 6. That it may also be true that if the children remove or die subsequently to the signification of intention by the parent to remain, and prior to the expiration of the five years, still that the parent is entitled to a patent for the half and quarter sections as well as the whole section.

7. That it may be that the consideration for the grant moves from the parent alone.

But notwithstanding the several arguments that may be drawn from these observations, they cannot overcome the language of the treaty. If, indeed, the word "to" were "for," and the words "to adjoin the location of the parent" were stricken out, I think it might well be said that the parent was entitled to the half and quarter sections on account of, and not in trust for, the children.

The word "for" is equivocal, but "to" admits only one construction. We must, therefore, strike out the latter word, or we must read that the parent entitles himself to a "reservation" of a quarter section to every "such child" under ten years of age. "For" ceases to be equivocal under the light of the context, and must be read "in trust for," and not on account of the children. This construction is strengthened by the words "to adjoin the location of the parent," as they tend strongly to show that the lands which were to adjoin the parents were not the lands of the parents.

But it is said there has been a contemporaneous construction of the 14th article of the treaty, and that it ought to be adhered to, unless it is "plainly against the obvious meaning of the words of the instrument." I do not think, however, it can be certainly said that there has been a contemporaneous construction of the article in question, for the claim by the head of the family was properly made for the half and quarter sections, and it was quite immaterial, if it were not proper, that the patent for the whole land issued to the parent.

My opinion, therefore, is that William Hall held the lands, specified in the agreement between Wilson and the complainants, in trust for his children, for they were parts of the land which adjoined "the location of the parent," and which was patented to him; and this construction is sustained by Pickens vs. Harper, 1 Smedes & Men. Ch. R. 539.

But it is said in the defence that Wilson is a purchaser for a valuable consideration without notice; but that defence cannot avail in this cause, for the patent itself gives notice of the claim of the complainants. Wilson, therefore, had notice of the trust, and took the lands, therefore, as trustee.

Let the following decree accordingly be entered:—

This cause came on to be heard on bill, answer of Wilson, exhibits and agreement between the complainants and said Wilson, and upon consideration thereof it is ordered, adjudged and decreed, that the complainants are entitled to relief. And it is therefore referred to the Register to ascertain and report how much of the said lands in the possession of said Wilson, each one of the children of the said William Hall named as complainants, is entitled to; and in ascertaining the number of acres the Register will first ascertain what each one would have been entitled to had none of the children died, and then he will divide the shares of those who were dead, unmar-

ried, and without issue, before the filing of the bill, equally among the children of the said Hall, who are complainants in this cause.

And it is further ordered that it be referred to the Register to ascertain and report three suitable persons to act as commissioners in making partition of said lands among the said children.

And further, it is ordered that it be referred to the Register to state an account between the said parties, charging the defendant, Wilson, with the rents and profits of said lands in his possession from the time he went into possession thereof, with interest according to the usual way of charging the same between trustee and cestui que trust, and allowing him credit for the cost of all necessary and proper improvements made upon the lands, with interest from the date thereof in the same manner as he is chargeable with interest upon rents and profits.

And it is further ordered, by consent of both parties in term time, that this decree be enforced in vacation as of the last term; and further that the Register report to the next term of this court.

WADE KEYES, Chancellor.

Filed 18 Aug., 1854.

Attest: GEO. B. SAUNDERS, Reg.

(Order at Jan. T., 1855.)

And at a Court of Chancery held for the Sixth District, composed of the county of Sumter, in the State of Alabama, at the court-house thereof in the town of Livingston, on the first Monday after the fourth Monday of December, in the year of our Lord one thousand eight hundred and fifty-four, being the first Monday and first day of January, in the year of our Lord one thousand eight hundred and fifty-five, and on Tuesday, Jan'y 2d, 1855 (being a day of said term), present, the Hon. Wade Keyes, chancellor of said court, the following order was passed in said cause, to wit:—

(Order at April T., 1855.)

THOMAS WALL & WIFE et als.
vs.
WM. BATES et al.
} 321. Continued.

And at a Court of Chancery held for the Sixth District, composed of the county of Sumter, in the State of Alabama, at the court-house thereof in the town of Livingston, on the first Monday after the fourth Monday of March, 1855, being the first Monday and 2d day of April in said year, present, the Hon. Wade Keyes, chancellor of said court, the following order was passed in said cause, to wit:—

(Order at Dec. T. 1855.)

THOS. WALL & WIFE et als.
vs.
WM. BATES et al.
} 321. Continued.

And at a Court of Chancery held for the Sixth District, composed

of the county of Sumter, in the State of Alabama, at the court-house thereof in the town of Livingston, on the first Monday after the 4th Monday of Decb'r (being the thirty-first day of said month), 1855: The Hon. Wade Keyes, chancellor of said court, not being present, the sheriff opened and adjourned the court until to-morrow morning, 9 o'clock.

On Tuesday morning, January 1st, 1856, the Hon. James B. Clark, Chancellor of the Middle Chancery Division of said State, appeared and opened court according to law, when the following order was passed in said cause, to wit:—

(March T., 1856.)

This cause is continued for execution of a reference.

THOS. WALL & WIFE et als.
vs.
WM. BATES et al.

And at a Court of Chancery held for the Sixth District, composed of the county of Sumter, in the State of Alabama, at the court-house in the town of Livingston, on the 1st Monday after the 4th Tuesday of March (being the 31st day of said month), 1856: Present, the Hon. Wade Keyes, Chancellor of said court; and on Tuesday, April 1st, 1856 (being a day of said term), the master filed his report in said cause in the words and figures following, to wit:—

In Chancery. Sumter County, Alabama.

THOMAS WALL & WIFE et als.
vs.
SAMUEL WILSON. } 321.

To the Hon. Wade Keyes, Chancellor of the Southern Chancery Division.

In pursuance of a decree rendered in this cause, as of the spring term, 1854, I report:—

1. That I have stated an account between the said parties, charging the def't with the rents and profits of the southeast quarter and the south half of the northeast quarter of section fourteen, in township eighteen of range one east (referred to in complainants' bill, and sought to be recovered of said Wilson) from the time he went into possession thereof (in 1836), with interest, according to the usual way of charging interest between trustee and cestui que trust, and allowing him credit for the cost of all necessary and proper improvements made upon the land, with interest from the date thereof, in the same manner as he was charged with interest upon said rents.

2. That the rents of the open land on said tract, for fourteen years, commencing with the year thirty-six, and ending with the year forty-nine, both inclusive, amount to thirteen hundred and

ninety-six dollars; that the interest on said rents from the 1st day of January, 1837, to the 1st day of January, 1856 (computing interest on the first year's rent from the first day of January ensuing), and so on through said period, is twelve hundred and sixty-eight $\frac{08}{100}$ dollars, making the rents and profits twenty-six hundred and sixty-four $\frac{08}{100}$ dollars.

For the years 1850, 1851, 1852, 1853, 1854 and 1855, the rent of the land was not worth anything.

3. The improvements consisting of clearing land, building negro houses, dwelling-house, kitchen, smoke-house, stables, corn-cribs, digging wells, putting out apple and peach orchards, making gardens, building and repairing gin-houses, and screws, ditching, renewing fences, taxes paid, &c., amount to nineteen thousand and eighty-eight dollars, in principal and interest, leaving a balance in said Wilson's favor of sixteen thousand four hundred and twenty-three $\frac{92}{100}$ dollars, on said first day of January last. The year of making each improvement was ascertained as well as the value of it, at that time, and the interest calculated on the same principle as it was on the rents and for the same period.

4. That the children of William Hall are seven in number, and there being only two hundred and forty acres of poor land for division among them, I have thought it more to their interest to recommend its sale and a division of the proceeds, than to recommend commissioners to partition it.

In executing said reference, I referred to the pleadings in the file, and examined witnesses *viva voce*. Said reference was executed at my office in the town of Livingston, on due notice to the parties entitled to it, on the day of the date hereof.

Which is respectfully submitted, 28th March, 1856.

GEO. B. SAUNDERS, R. and M.

Filed 1 April, 1856.

Attest: GEO. B. SAUNDERS, Reg.

The foregoing report having been read in open court, the following order was passed in said cause, to wit:—

THOMAS WALL and WIFE et als.
vs.
WILLIAM BATES et al. } 321.

Report read and ordered to lie over.

(Exceptions to Report).

In the Chancery Court of Sumter.

THOMAS WALL and WIFE et als.
vs.
SAMUEL WILSON. } 321.

The complainants except to the report of the Register this day read in this cause, on the following grounds:—

1. Because said report is incredible in itself, in showing that the lands, with improvements on it to the amount of upwards of nineteen thousand dollars, was only worth for the use and occupation of it from 1837 to 1850, the sum of about $2500, including interest, and nothing from 1850 to 1856.

2. Because the defendants in possession had no right to put improvements on the land, to the amount reported, when they must have known, if the fact is as reported, that the use, rent and occupation of the land, was of but little value, so as to charge the complainants therewith.

3. Because said report shows a balance due from complainants to defendant of upwards of eighteen thousand dollars, when no balance is properly recoverable from them, or chargeable upon the land. For which reasons said complainants pray that said report may be set aside, and another reference ordered.

April 1, 1856. T. REAVIS, Sol. for Compl'ts.

Filed 1 April, 1856.

Attest: GEO. B. SAUNDERS, Reg.

Said exceptions having been heard, the court made further orders, which are as follows:—

Report set aside, and referred back to the Register to restate the account, and report the evidence upon which he shall base his report, and continued.

It is ordered that the time for giving security for cost in this cause, as to all the defendants, except Wilson, be extended ninety days from this time.

And afterwards, to wit, on the 10th May, 1856, the following bond for costs was filed in said cause, to wit:—

ALEX. BRASHEARS et al.
vs. } 321.
JAMES N. HART et al.

and

THOMAS WALL & WIFE et al.
vs. } 321.
WM. BATES et al.

In Chancery Court of Sumter.

I acknowledge myself security for cost in the above stated causes. Given under my hand and seal this 8th May, 1856.

R. H. SMITH. [SEAL.]

Filed 10 May, 1856.

Attest: GEO. B. SAUNDERS, Reg.

And at a Court of Chancery held for the Sixth District, composed of the county of Sumter, in the State of Alabama, at the courthouse in the town of Livingston, on the first Monday after the fourth

Monday of March (being the 30th day of said March), 1857: present, Hon. Wade Keyes, Chancellor of said court, was filed in said cause a further report of the master, in the words and figures following, to wit:—

THOMAS WALL & WIFE & others
vs.
SAMUEL WILSON. } 321.

In Chancery, 6th District, Alabama.

To the Hon. Wade Keyes, Chancellor of the Court of Chancery for said district, in the southern division:—

In pursuance of the decretal orders passed in this cause at the spring term, 1854, and at the spring term, 1856, I report—

That from the evidence adduced before me, I conclude that the value of the rents and profits of the southeast quarter, and the south half of the northeast quarter of section fourteen, in township eighteen, of range one east (referred to in complainants' bill), from the time the def't Wilson went into possession of it, and the "*cost of all necessary and proper improvements made upon the lands*," are about equal. The evidence upon which this conclusion is based (the evidence of Patrick B. May) is herewith reported.

I further report, that the children of William Hall are seven in number, and there being only 240 acres of poor land for division among them, I have thought it more to their interest to recommend its sale and a division of its proceeds, than to recommend commissioners to divide it.

In executing the reference I referred to the pleadings on file, and examined the witness, May, *viva voce*. Said reference being executed at my office, in the presence of the counsels of the parties, respectively, on the day of the date hereof.

All which is respectfully submitted.

30 Mar. 1857. GEO. B. SAUNDERS, Reg.

THOMAS WALL & WIFE et als.
vs.
SAMUEL WILSON. } 321.

In Chancery, Sumter Co., Ala.

The evidence of Patrick B. May, a witness for the defendant, taken before the Register, at his office, on the 30 March, 1857, on the reference to him.

Witness knows the land and has known it since 1833 or 1834; Wilson went into possession of it about 13 Dec., 1834; cleared 30 acres in 1834 (in the fall of 1834 and spring of 1835), was worth $30 or $35 an acre to clear it; in 1836, 20 acres were cleared, worth the same; don't recollect any cleared in 1837; in 1838, 17 acres cleared, worth the same; none cleared in 1839; in 1840, 5 acres cleared, worth the same; none cleared in 1841; 1842, 10 acres

cleared, worth the same; in 1843, 10 acres cleared, worth the same; 1844, 15 acres cleared, worth the same; 1845, 10 acres cleared, worth the same; 1846, none cleared; 1847, none; 1848, none; 1849, 10 acres cleared, worth the same; 1850, 5 acres cleared, worth the same.

In 1844 or 1845, Wilson planted a peach and apple orchard, worth $250.

Buildings put on the land by Wilson. 1844, gin-house, worth $700; in 1835, dwelling-house, worth $500, 3 negro-houses, worth $150; in 1846, 3 more, worth $150; in 1838, overseer's house, smoke-house, &c., worth $250; in 1844, another negro-house, worth $50; in 1835, 3 stables, worth $120; fence there now, nearly all the 240 acres fenced, worth now to put them there $1000; in 1848, 2 stables built, worth $80; in 1835, a corn-crib, worth $50; in 1836, 2 more corn-cribs, worth $80; in 1845, 2 gardens made, worth $120; in 1850, $100 worth of ditching done. Taxes paid, $7 50 a year, from the possession in 1841; screw built, worth $300. Gin-house and screw both blown down and rebuilt.

Cross-examined.

Is a defendant to this suit, but not interested in any part of this 240 acres; is interested in the principles of this account, being a defendant in a similar case; is a farmer, and has been more than 30 years; rent of land cleared in 1834, worth $1 an acre; in 1835, and until 1st Jan'y, 1837, worth from the it was cleared from $1 to ½ dollar an acre, for about half the time since; the other half of the time it was worth nothing; the 28 acres cleared in 1836, worth 75 cts. the first year, the next $1 50 to 75 c. an acre for about half the time, and the other half of the time worth nothing; the 17 cleared in 1838, worth about the same; the 5 cleared in 1840, worth the same; the 10 cleared in 1842, worth the same; the 10 cleared in 1843, worth the same; the 15 cleared in 1844, worth the same; the 10 cleared in 1845, worth the same; the 10 cleared in 1849, worth the same; the 5 cleared in 1850, worth the same. Don't know how much the use of the peach and apple orchard was worth; don't know how much the use of the gin-house was worth after it was put up in 1844. Wilson ginned from 5 to 15 bales cotton a year; don't know how much the use of the dwelling-house was worth; don't know what the whole place, after all improvements, was worth; the whole place, with the improvements, &c., sold in 1850, for $200 or $250; the land was worth in 1834, $2½ an acre; the improvements made on the land were injudicious; would not have cleared the land for it; the present value of the improvements to remain on the land is nothing, but the same improvements on land to which they would be suited, would enchance its value $1500.

GEO. B. SAUNDERS, Reg.

Filed 30 Mar., 1857.

Attest: GEO. B. SAUNDERS, Reg.

THOMAS WALL and WIFE, et al.,
vs.
SAMUEL WILSON. } 321.

Exceptions to Master's Report.

The defendant, by his solicitors, excepts to the report of the master, this day made and filed in this cause, and assigns for ground of exception and error in said report:

1. That the master does not allow to the defendant compensation for the excess of the value of improvements set out in the evidence, above the value of the rents; that is, that defendant is not allowed compensation for clearing the land at the price and value shown by the evidence, and for the peach and apple orchard planted by him, and for the value of the buildings and fences erected and placed upon said land, and for the gardens made thereon, and the ditching of said land, to the amount of the value of said improvements, as shown by the evidence, and which much exceeds the value of the rents.

And the defendant insists that he is entitled to have and receive from the complainants the excess of the price and value of such improvements over and above the value of the rents of said lands. And that he is entitled by a decree of this honorable court to have such excess paid him by the complainants before the complainants can enter into the possession under a recovery in this case.

And the said defendant prays that his exceptions may be allowed.

LYON & PRINCE, Sols. for Def't.

March 30, 1857.

Filed 30th March, 1857.

Attest: GEO. B. SAUNDERS, Reg.

(Further Decree.)

And at the term of said court last aforesaid, and on Tuesday, 31st March, 1857 (being a day of said term), a further decree was made in said cause, in the words and figures following, to wit:—

THOMAS WALL and WIFE et als.
vs.
WM. BATES et als. } 321.

This cause came on further to be heard on the Master's report and exceptions thereto; and upon consideration thereof it is ordered that the exception be overruled, and that the report be confirmed.

And thereupon it is ordered, by consent of complainants, that the Register advertise and sell the lands claimed by the defendant Wilson, according to the rules prescribed for sale of realty under execution.

It is further ordered that he ascertain the amount of the proceeds of the sale to which each one of complainants is entitled, and that he report the same, together with his other actings under this de-

cree, at the next term of this court, and that the cause stand continued.

(Reg's Cert.)

The State of Alabama, Sumter County.

I, George B. Saunders, Register of the Court of Chancery for said county, do hereby certify the foregoing to be a true transcript of the cause in said court between Thomas Wall and wife, and others, complainants, and Samuel Wilson, defendant, taken from the record and papers on file in said cause.

Given under my hand and private seal (there being no seal of office), at Livingston, this 17th day of November, A. D. 1857.

GEO. B. SAUNDERS, Reg. [SEAL.]

And upon said transcript of the record the following errors were assigned, to wit:—

In the Supreme Court. June term, 1858. Assignment of Errors.

And comes the appellant by his attorney and assigns error in the decree of the Chancellor in this:—

1. That the Chancellor erred in not dismissing the bill for want of equity therein, inasmuch as it appears from the record, if the complainants had any rights or title in the premises, they had ample remedy at law, by ejectment or trespass, to try titles: And there is no foundation laid in said bill for resorting to equity for discovery, account or partition.

2. That the Chancellor erred in his construction of the treaty, in affirming that any right or title was thereby conferred on the complainants.

3. In charging the defendant, the purchaser under the patent, with notice of such right or title, if any existed, and establishiug a trust against him in their favor.

Wherefore, it is prayed that said assignment be allowed, and said decree be reversed, and a decree be here rendered dismissing the bill.

JOHN T. LOMAX,
of Counsel for Appellant.

There is no error in the record.

SMITH, for Appellee.

And afterwards, to wit, on Wednesday, July 20th, 1859, being a day of the June term, 1859, of said Supreme Court, the following judgment was rendered, to wit:—

SAMUEL WILSON
vs.
THOMAS WALL and WIFE, et als. } 4 Div. 4258.

Came the parties by their attorneys, and the record and the matters assigned for error therein being argued and examined, it seems

to the court that in the record and proceedings of the Chancery Court of Sumter County there is no error.

It is, therefore, considered by the court that the decree of said Chancery Court be in all things affirmed, and that said appellees recover of said appellant, and of Arnold A. Powell, Patrick B. May, sureties for the costs of the appeal, the costs accruing on said appeal in this court and in said Chancery Court.

(Writ of Error.)

United States of America.

The President of the United States of America to the Judges of the Supreme Court of the State of Alabama, greeting:

Because in the record and proceedings as also in the rendition of a judgment in a plea which is in the said Supreme Court of the State of Alabama, before you, between *Samuel Wilson* and *Thomas Wall and Wife, et als.*, a manifest error hath happened, to the great damage of the said *Samuel Wilson*, as by his complaint appears: And it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: You are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday in December next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States, and the seal of the Circuit Court of the United States for the Fifth Judicial Circuit and Southern District of Alabama, this 26th day of October, A. D. 1859.

[L. S.] Attest: R. B. OWEN,
Clerk Cir. Co. Sou. Dis. Ala.

Allowed by the Hon. A. J. Walker, Chief Justice of the Supreme Court of Alabama.

Filed Nov. 18th, 1859. JOHN D. PHELAN,
Cl'k Sup. Co't Ala.

(Bond.)

United States of America.

Know all men by these presents that we, Patrick B. May and Arnold A. Powell, both of Sumter County, Alabama, are held and firmly bound unto Thomas Wall and Catharine Wall, his wife, David Fulsom and Jane, his wife, William Muncrief and Margaret,

his wife, James N. Traham and Sarah, his wife, in the sum of five hundred dollars, to be paid to the said Thomas Wall and others, their executors and administrators, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 9th day of November, 1859.

The condition of the above obligation is such that, whereas, the above named Samuel Wilson has prosecuted a writ of error to the Supreme Court of the United States, to reverse a judgment or decree rendered by the Supreme Court of the State of Alabama, in a certain cause in equity, in which the said Samuel Wilson was the plaintiff or appellant, and the said Thomas Wall and wife, and others, the defendants or appellees: Now, if the above named Samuel Wilson shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

P. B. MAY.
A. A. POWELL.

Signed, sealed and delivered in presence of
JOHN T. LENOX,
GEO. B. SAUNDERS.

Approved by A. J. WALKER,
Chief Justice Sup. Court of the State of Ala.

(Cert.)

The State of Alabama, Montgomery County.

I, John D. Phelan, Clerk of the Supreme Court of the State of Alabama, do hereby certify that the foregoing pages, from one to forty-three inclusive, contain a full, true, and correct transcript of the record in the case therein named, from the Chancery Court of Sumter County, as the same appears on file in my office, and of the judgment of the Supreme Court rendered thereon, and of the writ of error and bond as the same remain of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the court this 23d day of December, A. D. 1857.

[SEAL.] Attest: JOHN D. PHELAN,
Cl'k Sup. Co. Ala.

The United States of America

To Thomas Wall and Catharine Wall, his wife, David Fulsom and Jane Fulsom, his wife, William Muncrief and Margaret Muncrief, his wife, James A. Traham and Sarah Traham, his wife, or Robert H. Smith, their attorney of record, greeting:—

You are hereby cited and admonished to be and appear at a Supreme Court of the United States now being holden at Wash-

ington, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Alabama, wherein Samuel Wilson was appellant or plaintiff in error, and you are defendants in error, or appellees, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Abram J. Walker, Chief Justice of the Supreme Court of Alabama, this 6th day of February, in the year of our Lord one thousand eight hundred and sixty.

A. J. WALKER, Chief Just.

Endorsed: Sam'l Wilson *vs.* Thomas Wall and wife et als. Citation: Rec'd and executed 10th February, 1860, on R. H. Smith, Esq., att'y of record. C. M. Godbald, U. S. Marshal.

Fees: Executing writ, $2 00

Mileage, 200 ms. to Mobile, 12 00—$14 00.

Filed 1st August, 1860.

See Choctaw Treaty 1830. 2 Ind. Aff. p. 399

Supreme Court of the United States.

SAMUEL WILSON,
vs.
THOMAS WALL and WIFE. } No. 15.

Treaty of "Dancing Rabbit," 27th Sept., 1830.

By the 3d Article, the Choctaw Nation cedes to the United States "the entire country it owns and possesses east of the Mississippi river."

The 14th Article is as follows:

"Each Choctaw head of a family, being desirous to remain and become a citizen of the States, shall be permitted to do so, by signifying his intention to the Agent, within six months from the ratification of this treaty, and he or she shall thereupon be entitled to a reservation of one section of 640 acres of land, to be bounded by sectional lines of survey; in like manner, shall be entitled to one-half that quantity for each unmarried child, which is living with him, over ten years of age; and a quarter section to such child as may be under ten years of age, to adjoin the location of the parent. If they reside upon said lands, intending to become citizens of the States, for five years after the ratification of this treaty; in that case a grant in fee-simple shall issue; said reservation shall include the present improvement of the head of the family or a portion of it," &c.

William Hall, who was a Choctaw head of a family, on 13th December, 1834 (p. 14), entered into an agreement of sale with defendant, Wilson, of the northeast and southeast quarters of section 14, binding himself to make good the title as soon as he obtained the same from the United States. On the 29th February, 1836, Hall executed a deed for the land, with warranty of title, and received the consideration of $150,

Wilson taking the possession, which he has maintained to the present time.

The patent from the United States, issued on 29th June, 1841. It declares Hall to be entitled, out of the lands ceded, "to three sections and a half section," and designates the land which "*has been located in favor of said William Hall as his reserve.*" It then grants "unto the said William Hall, and to his heirs, the said tracts above described." Page 17.

There having been some complaints that all the heads of families had not received their reservations, Congress, by act of 3d March, 1837, (5 stat., 180) appointed Commissioners to ascertain the names of these parties, and also the names and number of the *unmarried children under and over ten years of age*, and required a report to be made thereof.

On the 29th August, 1842, an act was passed directing the President to issue patents to all the heads of families, who had been ascertained to have complied with the provisions of the treaty, and as to lands located for the children, the patent was to issue "to said Indian child, if living, and if not to the heirs and representatives of such Indian child." 5 Stat., 515.

The bill of complaint is filed by the children of Hall against Wilson and the other defendants, who are alleged to be in possession of the lands (described in the patent) "reserved under the 14th art. of the treaty for said Wm. Hall and his children." It avers that by the death of their father "so much of said reservation as was his by said treaty, has descended to complainants as heirs-at law, and that the remainder of the lands belong to them by virtue of the treaty." The bill prays for a partition and an account of rents and profits.

The answer of Wilson sets up his title as a bona fide purchaser. He admits his knowledge that Hall was a Choctaw head of a family entitled to a reservation under the treaty, but did not know under which article of the treaty he claimed. He denies the construction put upon the treaty by the complainants, and insists that the treaty and patent both show that the lands were reserved to said Hall.

The case was tried on an agreed statement of facts (p. 16)

by which it was admitted that Wilson "had no notice of any outstanding title or claim of the children of Hall, unless he be charged with it from his answer in the cause, and the foregoing facts agreed on."

The supreme court of Alabama decided that by the 14th art. of the treaty, children were entitled to a grant—that the patent to Hall conveyed a fee simple to him coupled with a trust for so much as the children were entitled to—and that the defendants admission that he knew Hall claimed under the treaty charged him with notice of the trust. 34, Ala. 301.

From the date of the treaty, down to the act of 1842, the construction of the Executive Department, had been uniform that no provision was made for children as independent beneficiaries but that they were only named as measuring the quantity of land that should be assigned to the head of the family. Referring to these provisions the Commissioner of Indian affairs says, to the Attorney General in 1842, "these words were construed by Mr. Secretary Cass, to give to the parent, the title to the halves and quarters of a section stipulated for, in right of the children. This construction has been the uniform one of the Department in executing the treaty, and patents have issued accordingly of the correctness of which no doubt has been entertained heretofore. The register of those that applied to the agent under the article, contained the names of the heads of families only, which would seem to show that the children were not entitled in the opinion of the Indians themselves who furnised the materials for the register." p. 18.

That this is the proper construction is apparent from the following considerations:

1st. That our Indian treaties show no such grant in favor of children.

2nd. That if such a departure from custom was intended, clear and apt words would have been used to effectuate the object.

3rd. The grant provided for by the treaty is made dependent on the condition of residence upon said lands, with the intention of becoming citizens. Now to apply such a

condition to children of tender years would be a legal absurdity.

4th. The treaty mentions only children *living with the parent*. If children were intended to be provided for, why should those be excluded who happen not to live with the parent?

5th. If children were to be provided for why was a double quantity of land assigned to those over 10 years of age. It would seem that the larger quantity was due to those who were most helpless and dependent.

6th. On the opposite construction these difficulties disappear. We then understand the propriety of the condition requiring residence and intention to become a citizen. We then understand the fitness of the rule which limits the grant by the number of children *living with* the parent, for he is burthened only with the support of those who do. We then recognize also the reason of the difference made between children over and under 10 years of age, for as the expenses of the latter are greater, so the parent is furnished with larger means to meet them.

7th. This construction accords, also, with the grammatical harmony of the provision, whilst the opposite renders it wholly ungrammatical and confused. Besides the 640 acres the article provides "in like manner he shall be entitled to half that quantity *for* each child living with him over 10 years." So far all is free from doubt, but the sentence continues "and a quarter section *to* each child as may be under 10, to adjoin the location of the parent."

Now, if the word "to" gives rise to another and different construction which would be proper if "for" had been repeated, the question is which should be adopted? It is evident from the nature of these two parts of the sentence that the same intention was intended to be expressed; and we must write "for" in both or "to" in both, and for the reasons assigned it is submitted that "for" must be adopted. Let us read the whole sentence, with the use of the word "to" and it will be seen that no one entrusted with the draft of a treaty could have used such language.

"He shall be entitled to a reservation of 640 acres of land to be bounded by sectional lines; in like manner he shall be entitled to one half that quantity *to* each unmarried child living with him, over 10 years of age, and a quarter section *to* such child as may be under 10."

Finally the words, "to adjoin the location of the parent," is but an awkward mode of expressing the idea that the additional quantity granted on account of children was to adjoin the main location in conformity with the general policy of our land system.

It is submitted that a construction maintained by such reaons, one so long acted on by the Government, and under which a vast number of titles have been acquired, will not be lightly disturbed by this court.

But again, assuming that children were intended to be provided for, there is no warrant for saying that the treaty operated *proprio vigore* as a conveyance or grant. At most it was but an obligation or promise on the part of the Government. The only words of designation are "to adjoin the location of the parent."

Such a designation as this could not control the power of the Government to dispose of these lands, and its patent would convey a good title against the assertion of a right under this article. If all the lands adjoining were thus disposed of, the children would have a claim for indemnity against the Government, but no right of action against those claiming under the patent.

Admitting, therefore, that the patent to Hall vested in him a title to more land than by the treaty he was enlitled to—until revoked—the patent is effectual in conveying the title to his assignee, and no trust can be set up not apparent on the face of the instrument, or in the contemplation of the grantor.

The act of 1842, which provided for patents to be issued to the children, seems to contemplate the very case before us, for it provides, "that if the United States shall have disposed of any tract of land to which any Indian was entitled under the provisions of said 14 h article, so that it is now impossible to give said Indian the quantity to which he was entitled,

including his improvements, *or to his children on the adjoining lands*, the said commissioners shall estimate the quantity, and allow the same out of the public lands," &c. 5 Stats. 515.

This is a plain declaration of opinion, that the treaty did not operate as a grant, and that a patent for these lands conveyed the title.

This new construction is now sought to be enforced against a purchaser who it is admitted has acted honestly, paid a full consideration, and had never heard of a claim of title on the part of the children. The books will be searched in vain, for a precedent to oust a purchaser under such circumstances. The most learned jurists condemn the extension of constructive notice. Where no actual notice exists, no one should be charged with notice unless the circumstances are such as to enable the court to decide not only that he *might* have acquired, but that he *ought* to have acquired it, and that he was guilty of *gross negligence* in failing to do so. The question is not whether by *prudent caution* he might have obtained the knowledge, but whether the not obtaining it was an act of *gross or culpable negligence*. Sugden's Vendors, Lond Ed. of 1862, p. 783.

It necessarily follows that a purchaser is not chargeable with notice of an equity arising out of the mere construction of words which are uncertain.

Thus when a settlement was made in pursuance of articles, but the estate contrary to the intention of the parties is limited so as to enable the parent to dispose of it, it is clear the court will rectify the settlement according to the intention in favor of the issue as between themselves or as between themselves and persons claiming without consideration. *But this has never yet been done against a purchaser.*

Sugden on Vendors.
Cardwell *vs.* Mackrill. 2 Eden, 347.
Parker *vs.* Brooks, 7 Ves., 588.
Warwick *vs.* Warwick, 3 Ark., 291.
Story's Eq., 401.

P. PHILLIPS,
For Appellant.